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No. 06-1312

In the Supreme Court of the United States

JOSE JAVIER AVALOS-GUTIERREZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals abused its discretion in declining to recall its mandate so that petitioner could rely on a change in the law that occurred after the court of appeals' judgment became final and after this Court declined to docket an untimely petition for a writ of certiorari.

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OPINION BELOW

The order of the court of appeals denying the motion to recall the mandate (Pet. App. 5a) is unreported.

JURISDICTION

The order of the court of appeals was entered on December 28, 2006. A motion for reconsideration was denied on February 13, 2007 (Pet. App. 4a). The petition for a writ of certiorari was filed on March 28, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a citizen of Mexico who immigrated to the United States in 1982. Pet. App. 45a. In June 1996, he pleaded guilty to possessing less than a gram of cocaine, in violation of Texas law. *Id.* at 46a. The Immi-

gration and Naturalization Service commenced a removal proceeding against petitioner based on that conviction, *id.* at 44a-45a, and the Board of Immigration Appeals (BIA) ordered his removal, *id.* at 49a-50a.

2. Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Texas alleging, among other things, that he was eligible for cancellation of removal because his conviction was not for an aggravated felony. Pet. App. 31a-42a. Pursuant to the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 106(c), 119 Stat. 311, the district court transferred that action to the Fifth Circuit. Pet. App. 17a. Petitioner also filed in the Fifth Circuit a separate petition for review of the BIA's decision. *Id.* at 16a.

In January 2006, the court of appeals dismissed both petitions, but its order listed only the docket number of the direct appeal from the BIA's decision, and not the docket number assigned to the separate habeas petition. See Pet. App. 30a. Concerned that the court of appeals' dismissal of the habeas petition may have been a clerical error, petitioner filed a motion to reopen. In denying that motion in April 2006, the court specifically referred to the "second petition for review which was transferred to this Court pursuant to the REAL ID Act." *Id.* at 29a.

In April 2006, petitioner filed an unopposed motion to reconsider in light of this Court's grant of a writ of certiorari in *Lopez* v. *Gonzales*, 127 S. Ct. 625 (2006). The court of appeals advised petitioner that "[t]his case is closed" and no further action would be taken. Pet. App. 28a.

Petitioner did not file a timely petition for a writ of certiorari from the court of appeals' January 2006 dismissal. Instead, in July 2006, he attempted to file an un-

timely petition, which this Court declined to docket. Pet. 6 n.2; Pet. App. 7a.

3. In December 2006, petitioner asked the court of appeals to recall its mandate in light of this Court's then-recent decision in *Lopez*. Pet. App. 14a-26a. Petitioner's motion disclosed that after the court of appeals dismissed his challenges, and after he was deported, he illegally re-entered the United States, was apprehended, and pleaded guilty to unlawful re-entry. *Id.* at 19a n.3. The court of appeals denied petitioner's motion, *id.* at 5a, as well as a subsequent motion for reconsideration, *id.* at 4a. Following his conviction, petitioner was again removed from the United States to Mexico. See Pet. 6.

ARGUMENT

Petitioner argues (Pet. 7-8) that this Court should order the court of appeals to recall its mandate in order to reconsider this case in light of *Lopez* v. *Gonzales*, 127 S. Ct. 625 (2006). The court of appeals' judgment became final before this Court decided *Lopez*, and petitioner failed to file a timely petition for a writ of certiorari from that judgment. Moreover, petitioner subsequently pleaded guilty to illegal re-entry. For both of those reasons, petitioner is not entitled to the extraordinary relief he seeks.

1. Petitioner's position (Pet. 8-11) that he should be able to rely on this Court's decision in *Lopez* runs contrary to basic principles of finality. Changes in the law, such as this Court's decision in *Lopez*, generally apply retroactively to *pending* cases. But once a case reaches final judgment, that decision is final, and litigants are not generally entitled to reopen a case to rely on a change in the law. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995); *United States* v. *Schooner Peg-*

gy, 5 U.S. (1 Cranch) 103, 110 (1801) (explaining that if "*before* the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed") (emphasis added). Otherwise, final judgments would not be final.

Thus, while petitioner argues (Pet. 7-8) that he is similarly situated with other petitioners who had their cases remanded for reconsideration in light of *Lopez*, there is an obvious difference—the judgment in this case, unlike those cases, is final. The court of appeals' judgment became final when the time in which to file a petition for a writ of certiorari expired. See Pet. 12 n.4 (conceding that "the original 90 days for seeking certiorari expired"). And when petitioner later attempted to revive his case by filing an untimely petition for a writ of certiorari, this Court correctly declined to docket that petition. Pet. 6 n.2.

Petitioner is not entitled to circumvent normal rules of finality, including the time limit for filing a petition for a writ of certiorari, by demanding that the court of appeals reopen its mandate. "In light of 'the profound interests in repose' attaching to the mandate of a court of appeals, the power [to recall a mandate] can be exercised only in extraordinary circumstances." *Calderon* v. *Thompson*, 523 U.S. 538, 550 (1998) (quoting 16 Charles Wright et al., *Federal Practice & Procedure* § 3998, at 712 (2d ed. 1996)). Moreover, a court of appeals' exercise of that power is reviewed "for abuse of discretion." *Id.* at 549. And this Court would grant review on that question only if the court of appeals had "far departed from the accepted and usual course of judicial proceedings." Sup. Ct. R. 10(a). A court of appeals' decision to uphold normal finality rules—and to respect this Court's decision to enforce the time limits

for filing a petition in this Court from the court of appeals' final judgment—hardly amounts to an abuse of discretion, much less the type of departure from the ordinary course of proceedings that would warrant this Court's review.

2. Petitioner's reliance (Pet. 8 n.3, 10) on *Lords Landing Village Condominium Council of Unit Owners* v. *Continental Insurance Co.*, 520 U.S. 893 (1997) (per curiam), is misplaced. In declining to recall the mandate in that case, the court of appeals failed to discuss a contrary decision the Maryland Supreme Court had handed down 11 days before the court of appeals' initial decision, and it appeared that the parties had been unaware of the state court's decision until after the mandate issued. *Id.* at 895. This Court concluded that, in refusing to recall its mandate, the court of appeals should have explicitly discussed the relevance of the state supreme court case. *Id.* at 897. *Lords Landing* is inapposite because this Court decided *Lopez* after this case went to final judgment, not shortly before the initial court of appeals' decision, and normal finality rules therefore apply.*

3. Moreover, petitioner illegally re-entered this country after his removal, pleaded guilty to illegal reentry, and was removed once again. Pet. 6. Such unclean hands weigh heavily against a grant of discre-

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* Petitioner cites (Pet. 12 n.4) two cases in which the Fifth Circuit recalled its mandates. This Court does not sit to review asserted intracircuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957) (per curiam). Moreover, the decision to recall a mandate in a particular case is discretionary. See *Calderon*, 523 U.S. at 549. As discussed in the text, denial of such discretionary relief was warranted here not only in light of ordinary principles of finality, but also because of petitioner's illegal re-entry.

tionary relief, whether in the form of a recall of the mandate in these judicial proceedings or cancellation of removal in administrative proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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